82-1945

NO.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

OCEANIC CONTRACTORS, INC.
and INSURANCE COMPANY OF NORTH AMERICA,
(a/k/a INA Corporation),
Petitioners,

VS

LELAND CORMIER,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The sole issue in this case is whether a maritime worker, who is covered neither by the Jones Act nor by the Longshoremen's and Harbor Workers' Compensation Act, is entitled to a remedy for the unseaworthiness of a vessel. The Fifth Circuit Court of Appeals extended this remedy in its opinion below, relying upon its decision in *Aparicio v. Swan Lake,* 643 F.2d 1109 (5th Cir. 1981). However, the Ninth Circuit Court of Appeals, in an identical case, held that no warranty of seaworthiness obtains. *Normile v. Maritime Co. of Philippines,* 643 F.2d 1380 (9th Cir. 1981). The two decisions were rendered within four days of one another, and neither has been reviewed by this Court.

The present case thus embodies an inter-circuit conflict on an important issue of maritime law, for which the guidance of this Court is required.

LIST OF INTERESTED PARTIES

Oceanic Contractors, Inc. was the corporate forerunner of McDermott, International, Inc., a publicly-traded corporation, which is the majority shareholder of McDermott, Incorporated. In addition, there are numerous corporate entities and joint ventures connected with McDermott International, Inc.

The Insurance Company of North America (INA) is owned by the Cigna Corporation.

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SUPREME COURT OF THE UNITED STATES

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INSURANCE COMPANY OF NORTH AMERICA,
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VS

LELAND CORMIER,
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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DECISIONS BELOW

The judgment of the Court of Appeals for the Fifth Circuit is included herewith as Appendix A. The Order of the Fifth Circuit denying Petitioners' application for rehearing *en banc* was entered on March 29, 1983, and is contained in Appendix B. The opinion of the Court of Appeals for the Fifth Circuit is reported at 696 F.2d 1112 (5th Cir. 1983) and is included as Appendix C. The decision of the United States District Court for the Eastern District of Louisiana (The Honorable Fred J. Cassibry, Judge) was rendered on March 17, 1982. It was not reported, but is contained in Appendix D. Appendix E consists of the Findings of Fact and Conclusions of Law of the United States District Court. The Letter of Mandate of the Fifth Circuit Court of Appeals appears as Appendix F, with the Order of the Fifth Circuit appearing as Appendix G.

JURISDICTION

The District Court entered judgment on March 24, 1982. A timely appeal was taken, and the Court of Appeals affirmed; its judgment was entered on January 31, 1983. Petitioners then applied for rehearing *en banc;* in an order entered on March 29, 1983, this application was denied. Subsequently, the Court of Appeals stayed its mandate for a period of thirty days, commencing on April 20, 1983, to permit Petitioners to seek a Writ of Certiorari.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254 (1) and 28 U.S.C. §2101(c).

STATUES

The only statutes of any relevance to this case are contained in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.,* and, in particular, 33 U.S.C. §905(b), which states:

> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such

> action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT OF THE CASE

The Respondent, Leland Cormier, was employed as a "welder foreman" in a repair yard operated by the Petitioner, Oceanic Contractors, Inc. (Oceanic). The facility was located in Dubai, United Arab Emirates, on the Persian Gulf. Respondent's work was divided between boats and barges moored at Oceanic's dock, and the repair and fabrication facility on the adjoining land.

While returning to the dock from a barge that was undergoing repairs, Respondent fell from a ladder and sustained injuries. The ladder extended between the barge and the dock.

Suit was filed in the Eastern District of Louisiana seeking remedies under the Jones Act and the general maritime law, and invoking the Court's admiralty jurisdiction. On the motion of Petitioners, the Jones Act claim was dismissed; no appeal was taken from this judgment. The case was then tried without a jury. Having ruled that Respondent was not a "seaman" for purposes of the Jones Act, the District Court further determined that no coverage was supplied by the Longshoremen's and Harbor Workers' Compensation Act (hereafter "LHWCA"), since

the operation of that Act is confined to "the navigable waters of the United States." 33 U.S.C. §903(a).

After hearing the evidence, the District Court ruled that Respondent's accident was not caused by any negligence on the part of Oceanic, and further held that Respondent had not been contributorily negligent. However, the Court concluded that Respondent was entitled to a warranty of seaworthiness under the doctrine of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), and found that this warranty had been breached by Petitioner with respect to the condition of the ladder, an "appurtenance" of the barge upon which it rested. A judgment was entered in Respondent's favor, awarding him a total of $262,256.00 for past and future wage loss, disability, and pain and suffering.

The District Court's findings of fact are not questioned by Petitioners, and have never been the subject of any appeal by Respondent. What Petitioners do question are the Court's conclusions of law, and these were brought to the Fifth Circuit for review.

On appeal, the central issue was whether the District Court was bound by the decision in *Aparicio v. Swan Lake,* 643 F.2d 1109 (5th Cir. 1981), which revives the *Sieracki* doctrine in certain circumstances, or whether the Court should have followed the decision in *Normile v. Maritime Co. of Philippines,* 643 F.2d 1380 (9th Cir. 1981), which holds that the *Sieracki* doctrine has lost its vitality. Both of these decisions use the 1972 amendments to §905(b) of the LHWCA as a point of reference, and both decisions apply to the facts of the present case. The two decisions are, however, directly in conflict, and the Fifth Circuit has clearly declined to modify its view. This inter-circuit

conflict is the sole issue now presented for review. At least two other decision have treated this same issue, also arriving at contrary results. See *Pinto v. Vessel "Santa Isabel,"* 492 F.Supp. 689 (D.C.Cir.1980) and *Grice v. A/S J. Ludwig Mowinckels,* 477 F.Supp. 365 (S.D. Ala. 1979).

A short recital should be made of the issues *not* presented for review: the finding that Respondent was not a Jones Act seaman has gone unchallenged, as has the finding that negligence played no part in the accident described above. If a remedy is to be extended, it must be premised upon the application of the warranty of seaworthiness; to claim such a warranty, Respondent must be characterized as a "seaman," albeit one of a peculiar stripe.[1]

THE ARGUMENT

Although the duties of the Respondent as a sometime vessel repairer could qualify him as a "maritime employee" under the LHWCA,[2] and while Petitioner Oceanic could similarly qualify as a "maritime employer,"[3] the coverage of the LHWCA is only extended to accidents "occurring upon the navigable waters of the United States."[4] Accidents occurring beyond these waters (with the exception of accidents covered by the Outer Conti-

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[1] The Court may note that, since Oceanic was the employer of the Respondent as well as the owner of the vessel, this case fits within the doctrine of *Reed v. Steamship Yaka,* 373 U.S. 420, 83 S.Ct. 1379, 10 L.Ed. 2d 488 (1963). See also *Smith v. M/V CAPTAIN FRED,* 546 F.2d 119 (5th Cir. 1977).

[2] 33 U.S.C. §902(3).

[3] 33 U.S.C. §902(4).

[4] 33 U.S.C. §903(a).

nental Shelf Lands Act[5]) are presumably beyond the coverage of the LHWCA.[6]

This, at least, is the ruling made by both courts below, and this ruling was the predicate for the judgment. When Congress amended the LHWCA in 1972, the statute was altered to state specifically that the liability of a vessel to an injured worker "shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred."[7] Prior to the enactment of the 1972 Amendments, the seaworthiness warranty was given to maritime workers under the *Sieracki* doctrine:

> "...for injuries incurred while working on board the ship in navigable waters, the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards."[8]

It is the position of Petitioners that the *Sieracki* doctrine was legislatively overruled, a position that this Court has upheld: "Congress acted in 1972, among other things, to eliminate the shipowner's liability to the longshoremen for unseaworthiness and the stevedore's liability to the shipowner for unworkmanlike service resulting in injury to the longshoremen—in other words, to overrule *Sieracki* and

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[5] 43 U.S.C. §§ 1331 *et seq.*

[6] But see *Cove Tankers Corp. v. United Ship Repair, Inc.*, 528 F.Supp. 101 (S.D. N.Y. 1981).

[7] 33 U.S.C. §905(b).

[8] 328 U.S. at 99-100, 66 S.Ct. at 879-80.

Ryan."[9] The present matter involves a question of statutory construction, in that the legislative eradication of the *Sieracki* doctrine must be imposed in an area that the legislation itself does not specifically reach.

In *Aparicio,* the Fifth Circuit held that the Congressional abatement of the *Sieracki* remedy did not apply in cases outside the context of the LHWCA:

> "Congress simply did not consider the possibility that maritime workers not covered by the LHWCA qualified for *Sieracki* seamen status under the existing case-law. It was not unnatural for Congress to focus its effort to abolish the Sieracki-Ryan construct on the maritime workers covered by the LHWCA, the workers who constituted the bulk of those to whom the *Sieracki* doctrine is applicable, without considering seamen not covered by that statute."[10]

Thus, the *Sieracki* remedy has been given renewed vitality in the limited circumstances where no remedy under the LHWCA is present.

To the contrary, the Ninth Circuit in *Normile* held that the *Sieracki* remedy had been completely eviscerated by Congressional action, and was not a viable precedent even in a non-LHWCA context. The plaintiff in that case made the same argument accepted by the Fifth Circuit: that, since the LHWCA did not apply, neither did the Congressional abatement of *Sieracki.* The Ninth Circuit made this response:

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[9] *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 262, 99 S.Ct. 2753, 2757 (1979).

[10] 643 F.2d at 1118.

> "Plaintiff misconceives the evolution of the law. The Supreme Court gave private longshoremen absolute liability protection in 1946 with *Sieracki.* Between 1946 and 1972, public longshoremen asserted rights analogous to those afforded private longshoremen. In the 1972 Amendments, Congress took away absolute liability for injured private longshoremen and substituted a workmen's compensation schedule. All that the Supreme Court gave, Congress took away. There remains no viable precedent to which plaintiff-public employee can analogize. He has no cause of action."[11]

What the Ninth Circuit held, in effect, was that technical precedent could not support the extension of an extraordinary remedy such as that of *Sieracki.*

Petitioners are thus faced with two schools of thought on a common issue, one of which relies upon a strict reading of the law that governs a singular case, and another which views the law in broad terms to ascertain its direction. The guidance of this Court is required to resolve the conflict.

This Court has given such guidance before, in the very decision that is the subject of this dispute. Prior to *Sieracki,* no precedent existed upon which to justify a seaworthiness warranty for non-seamen. By looking to past decisions,[12] though, the Court was able to discern the direction of the law, and held that the extension of the

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[11] 643 F.2d at 1382.

[12] *Uravic v. F. Jarka Co.,* 282 U.S. 234, 51 S.Ct. 111 (1931); *International Stevedoring Co. v. Haverty,* 272 U.S. 50, 47 S.Ct. 19 (1926); and *Atlantic Transport Co. of West Virginia v. Imbrovek,* 237 U.S. 52, 34 S.Ct. 733 (1914).

remedy for unseaworthiness "rightly found support in the *trend and policy* of this Court's decisions...."[13] If this is so, the trend which culminated in *Sieracki* must surely have been halted by Congress. The time is now ripe for this Court to establish a new policy in the law of admiralty, and to dismantle completely the confused body of jurisprudence antedating the 1972 Congressional amendments.

Conditions of maritime commerce have altered drastically between 1946, when the *Sieracki* decision was written, and 1972, when the LHWCA was amended. The House Report submitted prior to the passage of the LHWCA Amendments makes the following observations:

> "In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port."[14]

This report may well do poetic justice to Justice Frankfurter's dissent in *Sieracki*:

> "Longshoremen and harbor workers are in a class very different from seamen, and not one calling for the creation of extraordinary obligations of the vessel or its owner in their favor,

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[13] 328 U.S. at 97, 86 S.Ct. at 878 (emphasis supplied).

[14] 1972 U.S. Code Cong. & Admin. News 4703.

> more than other classes of essentially land workers. Unlike members of the crew of a vessel they do not go to sea; they are not subject to the rigid discipline of the sea; they are not prevented by law or ship's discipline from leaving the vessel on which they may be employed; they have the same recourse as the land workers to avoid the hazards to which they are exposed to ascertain the cause of their injury and to prove it in court."[15]

The logic employed above should apply whether the longshoreman is injured in New Orleans or Dubai. The hazards are not distinguished by locale, and it is the hazard, not the locale, that should determine the remedy.

This Court may also notice that, despite the Fifth Circuit's assertion that only "pockets of *Sieracki* seamen"[16] exist throughout the world, the fact of the matter is that many United States-based corporations are extensively engaged in worldwide oil exploration and production, off the coasts of Africa, the Middle East, Asia, South America, Australia and Canada. To the extent that these workers are not assigned to specialized "vessels," but are instead primarily shore-based, their remedies are indefinite. Under the rulings below, however, they may be able to claim the extraordinary remedy for unseaworthiness in circumstances where their employment takes them aboard any of the innumerable vessels that support oil operations offshore.

The conflict between the two Circuit Courts is implacable, and the matter is of importance to the Petitioners

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[15] 328 U.S. at 105, 66 S.Ct. at 882.

[16] 643 F.2d at 1118, n. 17.

and many others similarly situated. A Writ of Certiorari should issue on this basis alone.

One other point should be made, though: the logic of the *Aparicio* decision may appear formidable, but it leads to an aberrant result, wherein admiralty law will once again recognize a "twilight zone." If Congress left *Sieracki* unscathed in a non-LHWCA setting, the federal courts have similarly left the Jones Act untouched in the areas where the LHWCA does not apply. Before the LHWCA was enacted in 1927, longshoremen were covered under the Jones Act.[17] And, in at least one case decided after the passage of the LHWCA, a Jones Act remedy was given to a longshoreman not covered by the LHWCA—the precise position of the Respondent herein.[18] If the Court is willing to sacrifice law to logic, it is submitted that the Jones Act remedy can be given to a worker who does not qualify for Jones Act status,[19] so long as the case arises in a non-LHWCA context. This aberration illustrates how the Court below ignored the teaching of this Court:

> "By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances.***Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach

[17] *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19 (1926).

[18] *Panama Agencies Co. v. Franco*, 111 F.2d 263 (5th Cir. 1940).

[19] *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

different results than Congress envisioned."[20]

Petitioners enjoin this Court to review the decision below: it distorts the uniform structure of maritime law, it promotes the dead letter of the law over its spirit and policy, and it leads to an unjust result in conflict with another court.

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[20] *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. at 273, 99 S.Ct. at 2763. (Citations omitted).

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were served upon counsel of record in this matter by hand-delivering them to his office in New Orleans, Louisiana on this 20 day of May, 1983.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3226
Summary Calendar

D. C. Docket No. CA-76-747 & 77-253-E

LELAND CORMIER,

Plaintiff-Appellee,

versus

OCEANIC CONTRACTORS, INC. and
INSURANCE COMPANY OF NORTH AMERICA,
(a/k/a INA Corporation),

Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff- appellee the costs on appeal, to be taxed by the Clerk of this Court.

JANUARY 31, 1983

ISSUED AS MANDATE: APR 8, 1983

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3226

LELAND CORMIER,

Plaintiff-Appellee,

versus

OCEANIC CONTRACTORS, INC.,
and INSURANCE COMPANY OF NORTH AMERICA,
(a/k/a INA Corporation)

Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 1/31/83, 5 Cir., 1983, __ F.2d __).
(March 29, 1983)

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor

Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX "C"
(CORRECTED)

Leland CORMIER, Plaintiff-Appellee,

v.

OCEANIC CONTRACTORS, INC. and
Insurance Company of North America
(a/k/a INA Corporation), Defendants-Appellants.

No. 82-3226
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Jan. 31, 1983.

Employer appealed from an award of damages entered by the United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., to an injured welder for breach of warranty of seaworthiness. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) although attack on panel decision of Court of Appeals, holding that 1972 amendment to Longshoremen's and Harbor Workers' Compensation Act did not deny warranty of seaworthiness to workers not covered by Act, was not frivolous, its premise, which was considered and rejected in panel decision, could properly be reconsidered only en banc, and (2) error, if any, in failure to credit certain workers' compensation benefits to judgment was not plain.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judge:

An employer appeals from an award of damages entered by the trial judge for injuries to a welder, employed by it in Dubai, United Arab Emirates. The welder was injured when he fell while working aboard a barge moored for loading. The trial court concluded that the welder was not a Jones Act seaman, that neither the employer nor the employee were negligent, and awarded damages for breach of a *Sieracki*[1] warranty of seaworthiness under this court's decision in *Aparicio v. Swan Lake,* 643 F.2d 1109 (5th Cir. 1981).

The employer's argument here in primarily an attack upon the continued vitality of this court's decision in *Aparicio.* It also urges a failure of the trial court to credit certain workers' compensation benefits to the judgment. Bound by that decision and finding no merit to its claimed credit to the judgment we affirm.

In *Aparicio,* we held that the 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act, 86 Stat. 1251, 1263, 33 U.S.C. § 901 et seq., § 905, did not deny the warranty of seaworthiness to workers not covered by the LHWCA. Here the employee, although a harborworker, was not under the reach of the LHWCA because he worked in a foreign country. The *Aparicio* panel in dictum anticipated this case, referring to such situations as "pockets of *Sieracki* seamen remaining after the 1972 amendments." *Id.* 643 F.2d at 1118 n. 17. The employer points to *Normile v. Maritime Co. of Philippines,* 643 F.2d 1380 (9th Cir.1981), decided four days after *Aparicio,* holding that Congress by its 1972 amendments to the LHWCA effectively eliminated the *Sieracki* warranty. *Normile* rejected the idea that Congress eliminated the

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[1] *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

Sieracki warranty of seaworthiness only for persons within the coverage of the LHWCA. As virtually conceded by the employer, *Aparicio* controls this case. While the attack on *Aparicio* is not frivolous its premise was considered and rejected in *Aparicio* and may properly be reconsidered only en banc.

The employer's argument that it should have been credited with workers' compensation benefits is flawed. It failed to raise the argument below and any error is not plain. *See Harden v. United States,* 688 F.2d 1025, 1032 (5th Cir.1982). Indeed, it did not plead payment as an affirmative defense. *See* Fed.Rules of Civ.Proc. 8(c).

AFFIRMED.

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LELAND CORMIER	CIVIL ACTION
Versus	NO. 76-747 c/w 77-253
OCEANIC CONTRACTORS, INC., and INSURANCE COMPANY OF NORTH AMERICA, (a/k/a INA Corporation)	SECTION "E"

(Filed Mar 18, 1982)

JUDGMENT

This cause came on for trial on a former day before the Court, and after hearing testimony, the Court took the matter under submission.

Now, therefore, considering the Findings of Fact and Conclusions of Law of the Court on file herein, and considering the direction of the Court as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Leland Cormier and against defendants, Oceanic Contractors, Inc., and Insurance Company of North America, (a/k/a INA Corporation), in the sum of $262,256.00 plus interest and costs.

IT IS FURTHER ORDERED that the Workmen's Compensation suit No. 77-253, Section "E" is hereby DISMISSED.

New Orleans, Louisiana, this 17th day of March, 1982.

FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE

APPENDIX "E"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LELAND CORMIER, Plaintiff	CIVIL ACTION
VERSUS	NO. 76-747
OCEANIC CONTRACTORS, INC. and INSURANCE COMPANY OF NORTH AMERICA (a/k/a INA Corporation), Defendants	SECTION "E" (4)
LELAND CORMIER, Plaintiff	CIVIL ACTION
VERSUS	NO. 77-253
OCEANIC CONTRACTORS, INC. and INSURANCE COMPANY OF NORTH AMERICA (a/k/a INA Corporation), Defendants	SECTION "E" (4)

Joseph J. Weigand, Jr., Esq.
Attorney for Plaintiff

James H. Daigle, Esq.
Attorney for Defendants

CASSIBRY, District Judge:

Plaintiff Leland Cormier seeks damages from defendant Oceanic Contractors, Inc., and Insurance Company of North America in Civil Action No. 76-747 for certain back injuries allegedly sustained by him in Dubai, U. A. E., on June 7, 1975 when a ladder he was using to leave a barge bent, causing him to fall to the ground. Cormier also filed Civil Action 77-253 against the same defendants under the Louisiana Workmen's Compensation Act. The two actions

were consolidated for trial. After considering the evidence, the memoranda, and the law applicable to this case, the Court now enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Leland Cormier signed a contract with Oceanic Contractors, Inc., dated July 19, 1974 and a portion thereof read as follows:

> The Employer shall provide, through insurance and other arrangements, for payment of industrial accident compensation and benefits to you, in accordance with the laws of the country where you are working, the compensation and benefits being at least equal to the Workmen's Compensation Law of the State of Louisiana.

2. Following the signing of the contract with the defendant in July, 1974, the plaintiff travelled overseas and worked as a welder. He was subsequently transferred to Dubai, U.A.E. as a welder foreman. As a welder foreman, the plaintiff supervised thirty to forty nationals, employed as welders, who worked aboard various vessels at McDermott's installation in Dubai, U.A.E. Fifty percent of the work was done on vessels and fifty percent was done in shops near the shipyard.

3. At the time of the accident, which was unwitnessed, the plaintiff, along with his crew, was working aboard an Oceanic barge, the Intermac Barge 400, which was about 100 feet wide and 300 feet long. The means used to climb to the top of the barge and exit therefrom was either by ladder or crane. Cranes were not available and plaintiff used aluminum ladders found in the yard by tying them

off at the top to bitts on the barge. He was descending one of these aluminum ladders from the top of the Intermac 400 when the ladder twisted causing the plaintiff to lose his balance and fall to the ground.

4. After the accident the plaintiff went to his living quarters to rest and recover from the fall. He lost feeling in his arm and shoulder, reported the accident the next day to his supervisor, Don Hebert, and a written accident report was made. He sought treatment at the local hospital in Dubai and then returned to work, but his conditioned worsened. He asked for leave and flew to Zurich, Switzerland and consulted with Dr. H. Eberle. He then returned to the United States and was referred by defendants to Dr. Charles A. Borne, a neurosurgeon in Lake Charles, Louisiana.

5. Dr. Charles A. Borne treated the plaintiff and surgery was performed on August 10, 1975, which consisted of a posterior cervical decompression laminectomy at C-4 C-5, C-5 C-6, and C-6 C-7 interspaces. The final diagnosis was "cervical spondylosis aggravated by trauma." Prior to the above described surgery, a myelogram was performed. In the doctor's opinion, the plaintiff should have been able to return to some light work six months to one year after the surgery. The disability rating was thirty to forty percent with restrictions of not doing a lot of overhead lifting or climbing and no repetitive bending. The doctor considered that an automobile accident of October 9, 1975 following the surgery increased the recuperative period of the plaintiff. According to him, the plaintiff was anxious to get back to work and was not a malingerer.

6. At the request of plaintiff's counsel, the plaintiff

saw Dr. Kenneth Vogel, a neurosurgeon, and at the request of defendants, plaintiff saw Dr. Richard Levy, a neurosurgeon. Since neither of these doctors were treating physicians, the court considers their testimony in light of Dr. Borne's testimony and finds they are basically compatible.

7. The plaintiff continued to see Dr. Borne at six-month intervals but his condition did not change. The plaintiff attempted to find work at various companies but was denied employment because of his neck condition. He then tried to begin a welding business and trucking business, but this failed. At the time of trial, plaintiff was working as a truck salesman earning about $700.00 per month.

8. Dr. Seymour Goodman testified that assuming the plaintiff could have worked one year following his accident, that his loss of past wages until time of trial and loss of future wages would be $202,256.00, without any inflation. This figure is based on the average income of the plaintiff four years prior to the accident, including the earnings of the last year (July, 1974 to June, 1975) which amounted to $40,000.00, and assumes the plaintiff could have returned to work one year after the accident earning the minimum wage.

CONCLUSIONS OF LAW

1. The court has jurisdiction over C. A. 76-747 under the General Maritime Law, and over C. A. 77-253 by virtue of the parties' diversity of citizenship.

2. The court has previously ruled that the plaintiff was not a Jones Act seaman. He was a welder performing

work aboard a vessel outside the Continental United States, therefore he cannot recover under the Longshoreman and Harbor Workers' Act, but he was entitled to the warranty of seaworthiness. Aparacio v. Swan Lake, 643 F.2d 1109 (5th Cir. 1981); cf. Normile v. Maritime Company of the Philippines, 643 F.2d 1380 (1981).

3. The preponderance of the evidence establishes that the ladder broke and twisted causing the plaintiff to fall. While the efforts of plaintiff to make this a "witnessed" accident are not laudable, I find that the accident did happen and plaintiff was injured. The breaking and twisting of the ladder rendered the barge unseaworthy.

4. The evidence does not show that the defendant was negligent for failing to provide plaintiff a safe means of ingress and egress to the barge. This contention is based on the argument that the defendant should have known that the ladders, if tied at the top, would bend and twist as the tides rose and fell. The fallacy of the argument is that plaintiff has not proved by a preponderance of the evidence that the rise and fall of the tides caused the ladder's breaking in this instance.

5. The defendant has not proved that the plaintiff was contributorily negligent. Although it was the duty of the plaintiff as foreman to select a ladder in good condition for use as a means of ingress and egress to and from the barge, the defendant has not shown that the ladder selected several days before the accident from those lying on the shipyard was so defective that the plaintiff knew or should have known that it was unsafe to use, and thus that he had a duty to choose a new one from the warehouse. As a matter of fact neither side in this case has shown what caused the ladder to break.

6. The plaintiff underwent surgery to his neck following a myelogram and as a result has a disability of thirty to forty percent which has impaired his earning ability. I find the following amounts will reasonably compensate the plaintiff for his injury:

A. Past wages	$ 88,790.00
B. Future wages	113,466.00
C. Pain and suffering	25,000.00
D. Disability	35,000.00

In the event the inflation factor in appropriate, I would award $192,190.00 as future wage loss.

7. The Workmen's Compensation Law of the State of Louisiana is not applicable. In the employment contract entered into in July 1974, Cormier and Oceanic Contractors, Inc., agreed only that Oceanic would provide through insurance and other arrangements compensation and benefits in accordance with the laws of Dubai, but at least equal to that provided by the Workmen's Compensation Law of the State of Louisiana. The defendant paid Cormier $65.00 per week through November 11, 1976 and made a cash advance to him of $6,500.00 which amounts to another 100 weeks of benefits up to and including mid-October 1978. The defendant has paid more than the Louisiana Workmen's Compensation Law required for injury producing temporary total disability. La. Rev. Stats. §§ 23:1202 and 1221, as of June 1975. The Workmen's Compensation suit shall therefore be dismissed.

The Clerk shall enter judgment in accordance with the views expressed.

FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE

New Orleans, La.
February 26, 1982.

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
600 CAMP STREET
NEW ORLEANS, LA 70130

April 20, 1983

TO ALL COUNSEL AND THE DISTRICT CLERK:

No. 82-3226
LELAND CORMIER
V.
OCEANIC CONTRACTORS, INC., ET AL.

(USDC #CA 76-747/77-253 E)

MANDATE RECALLED AND STAYED TO AND INCLUDING May 20, 1983

The Court has this day granted the recall and stay of the mandate to the date shown above. If during the period of the stay there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should *not* be made as a matter of course but only when the record is deemed essential to a proper understanding of the case

by that Court.

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

By copy of this letter to the Clerk of the District Court, we request that he return the opinion and judgment previously issued as mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: /S/JOAN PERKINS
Deputy Clerk

Encls.
Mrs. Loretta G. Whyte, Clerk
Mr. James H. Daigle (with enclosures)
Mr. Joseph J. Weigand, Jr.

P.S. to Mrs. Whyte: It will not be necessary for the record or exhibits to be returned at this time.

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3226

LELAND CORMIER,

Plaintiff-Appellee,

versus

OCEANIC CONTRACTORS, INC. and
INSURANCE COMPANY OF NORTH AMERICA,
(a/k/a INA Corporation),

Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

(Filed Apr 20, 1983)

ORDER:

☐ The motion of appellants for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of Certiorari is DENIED.

☒ The motion of appellants for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 20, 1983, the stay to continue in force until the final disposition of the

case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of _____ for a further stay of the issuance of the mandate is DENIED.

_____
UNITED STATES CIRCUIT JUDGE

Office-Supreme Court, U.S.
FILED
SEP 9 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1945

In the Supreme Court of the United States

OCTOBER TERM, 1983

OCEANIC CONTRACTORS, INC. and
INSURANCE COMPANY OF NORTH AMERICA
(a/k/a INA CORPORATION)

Petitioner

VERSUS

LELAND CORMIER

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

BRIEF OF LELAND CORMIER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether or not a longshoreman, a United States citizen, employed by an American owned company, is entitled to the warranty of unseaworthiness under *Sieracki* if he is injured outside the continental United States and not covered by the Longshoremen's and Harbor Workers' Act.

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IN THE
SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

BRIEF OF LELAND CORMIER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Leland Cormier sued Oceanic Contractors, Inc. and its insurer, Insurance Company of North America, for an injury he allegedly sustained while working in Dubai, United Arab Emirates. Plaintiff was engaged as a "welder-foreman" and, in that capacity, he supervised work done in defendant's marine department overseas. His work was divided between boats and barges tied at the dock and duties at the repair yard and fabrication facility on the adjoining land. The accident occurred when the plaintiff was returning to the dock and fell while descending a ladder

positioned next to and connected to a barge owned by Oceanic, and undergoing repairs at its facility.

Suit was filed in the Eastern District of Louisiana alleging a cause of action under the Jones Act and General Maritime Law. On defendant's motion, the Jones Act claim was dismissed; no appeal was taken from this judgment.

The case was tried without a jury, the Honorable Fred A. Cassibry, Judge presiding. Having ruled that plaintiff was not a "seaman" for purposes of the Jones Act, the Trial Court further determined that plaintiff was not covered as a "maritime employee" for purposes of the Longshoremen's and Harbor Workers' Act (LHWCA). After trial on the merits, the Court found that the defendant was not negligent and that plaintiff was not contributorily negligent. However, the Court concluded that plaintiff was entitled to a warranty of seaworthiness under the *Sieracki* doctrine, and determined that defendant's vessel was unseaworthy because of the condition of the ladder. A judgment was entered in plaintiff's favor, awarding him a total of $262,256.00 for past and future wage loss, disability and pain and suffering.

The Fifth Circuit Court of Appeals affirmed the District Court, relying upon *Aparicio v. Swan Lake,* 643 F.2d 1109 (5th Cir. 1981). The petition for Rehearing En Banc was denied.

SUMMARY OF THE ARGUMENT

A. *Normile* and *Aparicio* are not in conflict, because the longshoreman involved in *Normile* was covered by the LSHWA, whereas the longshoreman in *Aparicio* was not covered by the LSHWA.

B. A longshoreman who is not covered by the LSHWA, and not entitled to the benefits thereof, should not be denied his remedy for unseaworthiness under *Sieracki.*

ARGUMENT

The opposition contends that as to the issue presented herein, there is a direct conflict between the Ninth Circuit decision in *Normile v. Maritime Company of the Philippines,* 643 F.2d 1380 (9th Circuit, 1981) and *Aparicio v. Swan Lake,* 643 F.2d 1109 (5th Circuit, 1981).

We do not agree. In *Normile v. Maritime Company of the Philippines, supra,* a federally employed longshoreman sustained injuries in the course of his employment in the Continental United States and alleged a cause of action for unseaworthiness under *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

The plaintiff in *Normile, supra,* argued that because he was a federal employee he was not covered by the LSHWA, and, therefore, although Congress took away the unseaworthiness remedy with respect to private longshoremen, it was left intact with respect to public longshoremen.

The Ninth Circuit rejected plaintiff's argument and held that the 1972 amendment to the LSHWA applied to public as well as private longshoremen.

However, it should be noted that the Ninth Circuit made the following comments, which we intend to refer to later. The Ninth Circuit stated at page 1382—Footnote 2:

> "This conclusion does not leave plaintiff without adequate remedy. The Federal Employees' Compensation Act, 5 U.S.C., 8101 *et seq.*, entitles him as a federal employee to workmen's compensation virtually *identical* to that afforded by the Longshoremen's Act. Further, he can still recover from defendant under the Longshoremen's Act upon a showing of negligence. 33 U.S.C. 905(b). (emphasis added)

We further quote from pages 1382 and 1383 and footnote 4:

> "Though the Congressional intent is worth noting, we do not find it controlling. Indeed, were our opinion to hinge solely on statutory construction, rather than on the analysis in Part I, *ante*, we would never have reached the issue of legislative intent in the face of such a clear statutory mandate. The 1972 amendments eliminate longshoremen's actions for unseaworthiness only as to persons "*covered under this chapter.*" 33 U.S.C. 905(b). The whole chapter, in turn, is inapplicable to federal employees. 33 U.S.C. 903(a)(2). (The exclusion of federal employees was part of the original Longshoremen's Act of 1927. Congress altered part (a)(1) of this section in the 1972 Amendments, but left the exclusion for federal employees in part (a)(2) intact.) The statute is, accordingly, expressly inapplicable to one in plaintiff's position. Therefore, as a matter of simple statutory construction Congressional intent is not relevant." (emphasis added)

In *Aparicio v. Swan Lake, supra*, the plaintiff was also a federally employed longshoreman, however, he was injured in the Panama Canal Zone which is *not* included within the territorial limits of the LSHWA. We quote from

page 1117 and footnote 14.

> "The coverage of the LHWCA is defined by 33 U.S.C. 903 which precludes coverage under the act for an "officer or employee of the United States or any agency thereof..." 33 U.S.C. 903(a)(2). That provision also limits the territorial coverage of the act to "the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining areas customarily used by an employee in loading, unloading, repairing or building a vessel)." 33 U.S.C. 903(a). Section 902(9) defines United States in a geographical sense as "the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. 902(9). The navigable waters of the Panama Canal Zone are not "navigable waters of the United States" for purposes of LHWCA coverage. *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 960 & n.16 (5th Cir., 1971); *Panama Agencies Co. v. Franco*, 111 F.2d 263, 265 (5th Cir., 1940). Thus by virtue of both the exclusion from coverage by federal employees and the territorial restrictions on the coverage of the LHWCA, these federally-employed linehandlers injured in the Panama Canal Zone are not "covered" persons within the LHWCA."

The Fifth Circuit held that since the plaintiff was not covered by the LSHWA that he could maintain an action for unseaworthiness under *Sieracki, supra.*

Judge Rubin at pages 1117 and 1118 stated the following:

> "Like most legislation, the 1972 amendment

was a compromise. The legislative termination of the warranty of seaworthiness owed to the *Sieracki* seaman and the concomitant ending of the stevedore's contractual indemnification of the shipowner for that liability were enacted as the *quid pro quo* for the increase in compensation benefits payable under the LHWCA (15) and for a limited right to recover in tort from the vessel for negligence. 33 U.S.C. 905(b). Aparicio and the other maritime workers who are parties to the FECA scheme contend that, not having received the benefit of the bargain struck by Congress in the form of increased compensation payments provided those covered by the LHWCA, they should not be required to relinquish their *Sieracki* seaman status and their unseaworthiness action."

"At the time of the 1972 amendments, Congress was not unaware of the level of FECA benefits relative to those payable under the LHWCA. The legislative history of the LHWCA amendments indicates that at least certain members of Congress considered that the FECA benefits had already been raised to an adequate level.(16) In debating the proposed amendments, the congressmen noted the great disparity between maximum benefit levels available under FECA and the LHWCA, 118 Cong. Rec. 36386 (Oct. 14, 1972), but did not compare the benefits payable pursuant to the LHWCA with the FECA benefits available to a federal employee engaged as a maritime worker who, had he been privately employed and within the territorial coverage of the LHWCA, would have been covered by the LHWCA."

"The failure of the congressman to compare the benefits payable under the LHWCA to those available to a harbor worker or longshoreman

covered by FECA reinforces what is evident from the whole of the legislative history of the 1972 amendments: Congress simply did not consider the possibility that maritime workers not covered by the LHWCA qualified for *Sieracki* seaman status under the existing caselaw. It was not unnatural for Congress to focus its effort to abolish the *Sieracki-Ryan* contract on the maritime workers covered by the LHWCA, the workers who constituted the bulk of those to whom the *Sieracki* doctrine is applicable, without considering the fate of those relatively few *Sieracki* seamen not covered by that statute. Nevertheless, we do not consider the failure of these FECA maritime workers to receive the benefits of that compromise dispositive of the availability of the *Sieracki* remedy in this case."

"The Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and 'Congress has largely left to (the Supreme Court) the responsibility for fashioning the controlling rules of admiralty law.' *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 83 S.Ct. 1646, 1650, 10 L.Ed.2d 720." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409, 95 S.Ct. 1708, 1715, 44 L.Ed.2d 251, 262 (1975). "Admiralty law is judge-made law to a great extent..." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. at 259, 99 S.Ct. at 2756, 61 L.Ed.2d at 526. In *Sieracki* and *Ryan* the Supreme Court formulated remedies to deal with the peculiar perils faced by maritime workers based on policy considerations it determined to be controlling given those conditions of maritime work. Until Congress abrogates the remedies created by the Supreme Court as they apply to maritime workers not covered by the LHWCA, those workers remain entitled to relief and their employers and vessel owners remain bound by

the *Sieracki-Ryan* doctrine.17"

Footnote 17 on page 1118 is applicable to the case at bar.

> "Recognizing that the holding of this case is limited to those maritime workers not covered by the LHWCA who are participants in the FECA scheme, we note that the pockets of *Sieracki* seamen remaining after the 1972 amendments also may include those longshoremen and harbor workers who, though privately employed, are injured in a foreign country and thus are not within the territorial coverage of the LHWCA. *See, e.g., Grice v. A/S J. Ludwig Mowinckels,* 477 F.Supp. 365 (S.D. Ala., 1979) (privately employed longshoremen injured in Saudi Arabia). It is conceivable that American maritime law might apply in such a situation and that the maritime worker could qualify as a *Sieracki* seaman. Although the maritime workers in this case have available to them the compensation benefits payable under the FECA scheme, the worker injured outside of the territorial coverage of the LHWCA may either be covered by no compensation act or by a compensation scheme that is far more stringent in its benefits that is the LHWCA. *See Grice v. A/S J. Ludwig Mowinckels,* 477 F.Supp. at 367 n.5. The continued availability of the *Sieracki* remedy under such circumstances would assure the maritime worker an adequate recovery.

At the time of plaintiff's accident, he was earning in excess of $40,000.00 per year. His rate of compensation under the LSHWA would have been $450.00 per week plus medical benefits. Under the LSHWA if he could not return to the same type of work he would have been entitled to a wage differential for the rest of his life.

The plaintiff was in fact paid under the Louisiana State Compensation Act which provided $65.00 a week plus medical benefits until a person is discharged, regardless of disability.

The opposition asked the Fifth Circuit to recognize by judicial notice the fact that numerous companies from Louisiana have men working overseas in situations similar to that of the plaintiff. They contend that they should be entitled to the benefit of the amendment to the LSHWA in 1972, wherein the vessel owner was no longer subject to the *Sieracki* doctrine, and at the same time, be granted the absolute power to determine the amount of compensation that should be paid their injured employees, whether it be Louisiana compensation, Dubai compensation or whatever. This position was rejected by the Fifth Circuit in *Aparicio, supra.*

CONCLUSION

The *Normile* decision, *supra*, and *Aparicio* decision, *supra*, are not in conflict because the plaintiff longshoreman injured in *Normile* was covered by the LSHWA because he was injured within the territorial boundaries of the Act, whereas in *Aparicio* the plaintiff longshoreman was *not* covered by the LSHWA because the accident did not occur within the territorial boundaries of the Act.

The Fifth Circuit concluded that the amendment of the LSHWA in 1972 was a compromise wherein the maritime worker received increased benefits (five-fold) in return for losing his right to sue for unseaworthiness. As to maritime workers that are *not* covered by the LSHWA, they should retain their right to an action for unseaworthiness,

because they are not entitled to the benefits of the LSHWA.

Respectfully submitted,

WEIGAND, WEIGAND & MEYER

by:

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COUNSEL FOR RESPONDENT,
LELAND CORMIER

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Brief of Leland Cormier in Opposition to the Petition for Writ of Certiorari has been furnished to:

James H. Daigle
2100 Pan American Life
601 Poydras Street
New Orleans, Louisiana 70130

on this the 1st day of September, 1983.

JOSEPH J. WEIGAND, JR.